

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AGNES A. WILSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Albany, NY

*Docket No. 99-1126; Submitted on the Record;
Issued November 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof in establishing that she has a lumbar condition causally related to her November 27, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative as untimely.

On November 27, 1994 appellant, then a 55-year-old registered nurse, was helping to lift a patient when she developed pain in her neck. A magnetic resonance imaging (MRI) scan showed probable herniated discs at C5-6 and C6-7. On July 18, 1995 appellant underwent surgery for cervical discectomy at C5-6 and C6-7 with fusion from C5-7. The Office accepted appellant's claim for herniated discs at C5-6 and C6-7. In an August 31, 1995 report, Dr. David L. Semenoff, a Board-certified neurosurgeon, stated that appellant could return to light-duty work.

On November 3, 1995 appellant filed a claim for low back pain, with pain extending down her right leg. She stated that she had persistent symptoms of right leg numbness, including three toes of her right foot, since her November 27, 1994 employment injury. She related that an MRI scan in June 1995 showed a bulging disc, degenerative disc disease and arthritic changes but nothing correctable by surgery. In an accompanying statement, appellant stated that she believed that while her neck was immobilized by a neck brace, the constant twisting of her back to compensate aggravated her right leg condition.

In a July 8, 1998 letter, the Office requested additional evidence in support of appellant's claim for back pain. In response appellant submitted copies of medical reports previously submitted in support of her claim for her November 27, 1994 employment injury. In a June 22, 1995 report, Dr. Semenoff stated that, in addition to appellant's neck and left arm pain, she had pain in her lower back and right leg radicular symptoms. He therefore ordered a MRI scan of the lower back. An MRI scan of the lumbar spine showed degenerative disc disease with bulging annuli from L3-4 to L5-S1, but no herniated discs or spinal stenosis. In an October 5, 1995

report, Dr. Semenoff stated that appellant complained of back pain and some radicular symptoms in the right leg. He surmised appellant's problem was spondylitic in nature.

In a November 2, 1995 report, Dr. Semenoff stated that appellant returned with a severe bout of thoracolumbar pain of one week duration. He noted appellant complained of occasional numbness of the posterolateral aspect of the right leg, extending into the dorsolateral aspect of the right foot. Dr. Semenoff noted appellant had limitation of motion in the back. He commented that her neck was nearly asymptomatic, with occasional numbness of the fingertips of the left arm. Dr. Semenoff concluded that appellant's symptoms were gradually resolving and probably related to a lumbar strain or sprain with lumbar spondylosis and lumbar degenerative disc disease.

In an August 27, 1998 decision, the Office rejected appellant's claim for compensation on the grounds that she had not established that she had a medical condition caused or aggravated by a work-related injury.

In a September 29, 1998 letter, appellant requested a hearing before an Office hearing representative. In an October 30, 1998 decision, the Office denied appellant's request for a hearing on the grounds that the request was untimely and that the issue in her case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

The Board finds that appellant has not met her burden of proof in establishing that her back condition is causally related to her November 27, 1994 employment injury.

A person who claims benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim. Appellant has the burden of establishing by reliable, probative and substantial evidence that her medical condition was causally related to a specific employment incident or to specific conditions of employment.² As part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.³ The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.⁴ Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions, which are alleged to have caused or exacerbated a disability.⁵

Appellant claimed that her back pain, which radiated down her right leg, was caused by her November 27, 1994 employment injury. The MRI scan showed degenerative disc disease

¹ 5 U.S.C. §§ 8101-8193.

² *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

³ *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

⁴ *Juanita Rogers*, 34 ECAB 544, 546 (1983).

⁵ *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

and bulging lumbar discs. Dr. Semenoff commented that appellant's lumbar condition was probably a lumbosacral strain or sprain, with lumbar spondylosis and lumbar degenerative disease. He gave no opinion on whether appellant's back condition was causally related to the November 27, 1994 employment injury. Appellant did not submit any other medical evidence, which related her back condition to the employment injury. She, therefore, has not met her burden of proof in establishing that her back condition was causally related to the November 27, 1994 employment injury.

The Board further finds that the Office properly denied appellant's request for a hearing before an Office hearing representative.

Section 8124(b)(1) of the Act⁶ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."⁷ In this case, the Office's decision was issued August 27, 1998. Appellant's hearing request was dated September 29, 1998. Her request for a hearing, therefore, was not made within 30 days of the Office's decision.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In this case, the Office found that appellant's request for further proceedings could be addressed by a request for reconsideration and submission of additional evidence. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.⁸ There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

⁶ 5 U.S.C. § 8124(b)(1).

⁷ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

⁸ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated October 30 and August 27, 1998 are hereby affirmed.

Dated, Washington, DC
November 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member